

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

MDL NO. 1456

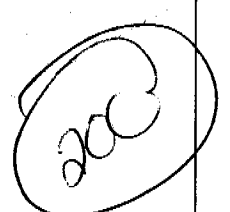
CIVIL ACTION NO. 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO ALL
ACTIONS

**MEMORANDUM OF IMMUNEX CORPORATION
IN SUPPORT OF ITS MOTION TO DISMISS**

Immunex Corporation joins and incorporates by reference the arguments in support of dismissal addressed in the Consolidated Memorandum in Support of Defendants' Motion to Dismiss Master Consolidated Class Action Complaint (the "Consolidated Memorandum") and the memoranda filed individually by Abbott Laboratories, Bayer Corporation, and other defendants. Immunex writes separately to address the application to it of the arguments that the Court should dismiss plaintiffs' claims because plaintiffs: (1) lack standing to sue



1 Immunex, and (2) failed to satisfy Rule 9(b)'s requirement to plead fraud by Immunex with
 2 particularity.¹
 3
 4

5
 6 **I. PLAINTIFFS LACK STANDING TO SUE IMMUNEX.**
 7

8 Plaintiffs lack standing to bring the claims against Immunex. Under Article III of the
 9 Constitution, individual standing does not exist unless a plaintiff "allege[s] personal injury
 10 fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by
 11 the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). To establish
 12 representational standing on behalf of an organization's members, an organization must
 13 establish that "at least one of [its] members possesses standing to sue in his or her own
 14 right." *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992). As outlined in the
 15 Bayer Memorandum and the Abbott Memorandum, plaintiffs must allege that they paid for
 16 an Immunex-marketed drug to have standing to pursue claims against Immunex. Except for
 17 plaintiffs Teamsters Health & Welfare Fund of Philadelphia and Vicinity ("THWF") and
 18 United Food and Commercial Workers Unions and Employers Midwest Health Benefits
 19 Fund ("UFCW"), no plaintiff alleges payment for an Immunex-marketed drug. Accordingly,
 20 all plaintiffs except THWF and UFCW clearly lack standing against Immunex.
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32

33 For the reasons laid out in the Abbott Memorandum (as to why UFCW lacks
 34 standing to sue Abbott), THWF and UFCW also lack standing to sue Immunex. THWF
 35 alleges that it "has been billed for and paid charges for Covered Drugs, including . . .
 36 Immunex' Novantrone." Compl. ¶ 24. Similarly, UFCW alleges that "has been billed for
 37
 38
 39
 40
 41
 42

43
 44
 45 ¹ Immunex assumes, solely for purposes of the motion to dismiss, that the allegations in the Complaint
 46 are true, even though the general allegations against "all" defendants are inaccurate in many respects as to
 47 Immunex and though plaintiffs are incorrect even as to their allegations as to which drugs Immunex markets
 and whether Medicare Part B covers Enbrel.

1 and paid charges for Covered Drugs, including . . . Immunex' leucovorin calcium." *Id.* ¶ 26.
 2
 3 (Immunex was no longer selling leucovorin calcium at the time of the Master Complaint.)
 4
 5 The Complaint, however, does not allege that the payments by THWF and UFCW were
 6
 7 based on the AWP's of Immunex drugs. As set forth in the Consolidated Memorandum,
 8
 9 Medicare co-payments are "based on the lower of the actual charge on the Medicare claim
 10
 11 for benefits or 95 percent of the national average wholesale price of the drug." 42 C.F.R. §
 12
 13 405.517 (2001). Therefore, the alleged overpayments by THWF and UFCW are not
 14
 15 "traceable" to Immunex, but to the providers that set the charges paid by THWF and UFCW.
 16
 17 In sum, none of plaintiffs have standing against Immunex.
 18

19 **II. PLAINTIFFS FAIL TO PLEAD FRAUD BY IMMUNEX WITH** 20 **PARTICULARITY** 21

22
 23 As set forth in the Consolidated Memorandum, the Complaint fails to allege fraud
 24
 25 with the particularity required by Rule 9(b). This is especially true as to Immunex – for the
 26
 27 same reasons it is true as to Abbott, and laid out in the Abbott Memorandum. Thirty-three
 28
 29 of the thirty-five plaintiffs fail to allege that they made a co-payment for any drug
 30
 31 manufactured by Immunex, and even THWF and UFCW fail to plead with particularity
 32
 33 fraud or fraudulent concealment *by Immunex*. See Compl. ¶¶ 24, 26.
 34

35 As also set forth in the Consolidated Memorandum, the few non-AWP-based
 36
 37 allegations about "improper " use of drug samples and physician "inducements" also violate
 38
 39 Rule 9(b)'s requirement of particularity. Compl. ¶¶ 162-65. An examination of plaintiffs'
 40
 41 "Examples of Specific Unlawful Conduct" reveals not a single "particular" as to Immunex
 42
 43 with respect to any improper use of drug samples or any improper "inducements." *Id.*
 44
 45 ¶¶ 289-93. Accordingly, the Court should dismiss plaintiffs' claims as to Immunex because
 46
 47 of plaintiffs' failure to satisfy Rule 9(b).


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

CONCLUSION


For the foregoing reasons, as well as those stated in the Consolidated Memorandum and the memoranda of other defendants, the Court should dismiss the Master Consolidated Amended Class Action Complaint as to Immunex.

DATED: November 4, 2002.

GOULSTON & STORRS LLP

By 
Thomas J. Sartory
Kenneth A. Sansone

PERKINS COIE LLP

By 
David J. Burman
Kathleen M. O'Sullivan
Zoe Philippides

Attorneys for Defendant Immunex Corporation